Louisiana Law Review

Volume 22 | Number 2
The Work of the Louisiana Supreme Court for the 1960-1961 Term
February 1962

Civil Code and Related Subjects: Community Property

Carlos E. Lazarus

COMMUNITY PROPERTY

*Carlos E. Lazarus**

In actions for damages against the husband, shown to have been the result of the negligent operation of a motor vehicle by the wife, the courts of appeal had announced conflicting rules. The courts of appeal for the Parish of Orleans and for the First Circuit had taken the position that the husband, in order to avoid liability must allege and prove that the vehicle was not being operated on a mission for his benefit or for that of the community.[1] On the other hand, the rule announced by the Court of Appeal for the Second Circuit was to the effect that in such cases, the plaintiff must, in order to state a cause of action, affirmatively allege and prove that the vehicle was being operated for the benefit of the husband or for that of the community.[2]

This conflict is resolved by the Supreme Court in *Martin v. Brown*.[3] Taking the sound position that since there is no right to proceed against a husband merely because of his relationship as such to the tortfeasor, a petition against the husband states no cause of action unless it contains allegations that his wife was on a mission for the community at the time of the commission of the tort. The basis of liability in such cases, said the court, is agency, and therefore, his consent, actual or implied, for the use of the vehicle by the wife as well as the fact that she was engaged in the service of her husband or in a mission for the benefit of the community, are necessary elements to be

---

the heirs are sent into possession without an adminstration. If the security is not furnished, the judgment of possession may be annulled. Article 3008. This article also provides that conventional mortgages and other encumbrances recorded prior to cancellation of the inscription of the registry of the judgment of possession shall retain their initial force. Even if this is extended to include purchases, as the comment indicates it should be, the article simply protects against any adverse effects of cancellation of the judgment of possession and would not eliminate the unrecorded privilege.

*Associate Professor of Law, Louisiana State University.

1. Johnson v. Delta Fire & Casualty Co., 110 So.2d 215 (La. App. 1st Cir. 1959).

2. Martin v. Brown, 117 So.2d 665 (La. App. 2d Cir. 1960) in which the court said: "The basis for this conclusion rests upon the principle that the burden of proof of an action in tort against a principal or master or employer, seeking to fix liability for the acts of the agent or servant or employee, requires pleading and proof of the respective relationships by the plaintiff . . . . [W]e see no reasonable ground for distinction between the categories above enumerated and that of husband and wife." *Id.* at 666.

3. 240 La. 674, 124 So.2d 904 (1960), 21 LOUISIANA LAW REVIEW 647 (1961).

alleged. But, said the court, "once the plaintiff has stated a cause of action and established that the accident occurred through the negligence of the wife in her use of the community car, which she was operating with the permission and consent (actual or implied) of the husband, since the husband has peculiar knowledge of facts which would relieve him of liability it then devolves upon him should he seek to avoid responsibility to show, to the satisfaction of the court, that the wife was on a mission of her own."[4]

Thus the question resolves itself into one of pleading and proof in which the plaintiff carries the burden of alleging all the necessary elements and of proving all but one, *viz.*, that the wife was on a community errand, as to which the defendant husband carries the burden of persuasion to the contrary.

CONVENTIONAL OBLIGATIONS

*J. Denson Smith**

The opinion of the court in *McGuffy v. Weil*[1] contains an interesting discussion of the legal nature of a restriction against the use of land. In connection with the sale of a city lot, the parties signed a separate contract in authentic form under the terms of which the vendor agreed that an adjoining lot would never be used except for residential purposes. It was provided that this restriction would constitute a covenant running with the land, binding upon all subsequent owners. The contract was recorded. Thereafter, the plaintiff, a successor in title to the original vendor, sought a declaratory judgment that the lot was free of the restriction. In holding against the plaintiff, the court found the restriction to be a continuous, non-apparent servitude, and concluded that, having been recorded in the form of a notarial act, it was "established by title" although it was not included in the act of sale itself. Consequently it was held binding. This classification is helpful. In addition, the decision may tend to overcome the impression obtainable from some earlier cases that a restriction of this kind is valid only if contained in a general scheme or plan of land development. Such a qualifica-

4. Martin v. Brown, 240 La. 674, 683, 124 So.2d 904, 908 (1960).

*Professor of Law, Louisiana State University.

1. 240 La. 758, 125 So.2d 154 (1960).